LE COPY

IN THE

Supreme Court of The United States

OCTOBER TERM, 1958

No. 74

HENRY J. MILLS
OSMOND J. LITOLFF,

Petitioners,

versus

STATE OF LOUISIANA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF LOUISIANA

SUPPLEMENTAL BRIEF FOR PETITIONERS

EUGENE STANLEY
819 Whitney Building
New Orleans, Louisiana

ALBERT B. KOORIE
Carondelet Building
New Orleans, Louisiana

Counsel for Petitioners

INDEX

Page

Argument 1

Summary of Argument:

Where the record shows that the District Attorney for the Parish of Orleans, State of Louisiana, interrogating petitioners before a State Grand Jury, admitted collaborating and co-operating with the U. S. Attorney for the Eastern District of Louisiana and the agents of the U. S. Internal Revenue Service regarding public bribery and income tax evasions, and had held conferences with such U. S. Attorney regarding public bribery and income tax evasions on the part of certain individuals then under investigation, felonies under the laws of the United States, said District Attorney for the Parish of Orleans, La.—a state official—was, to all intents and purposes, performing a federal function and is then regarded as a federal officer, subject to federal limitations and standard of conduct

If such District Attorney attempts to compel testimony from persons summoned before a State Grand Jury regarding the matters then being investigated, such witnesses are entitled to claim the protection of the Fifth Amendment to the U. S. Constitution

CITATIONS

Page

Feldman vs. U. S., 322 U. S. 487-494, 88 L. Ed. 1408 1

Barron vs. Baltimore, 7 Pet. (U. S.) 243, 8 L. Ed. 672 1

Brown vs. Walker, 161 U. S. 591, 40 L. Ed. 819, 16 S. Ct. 644 1

Jack vs. Kansas, 199 U. S. 372, 50 L. Ed. 234, 26 S. Ct. 73, 4 Ann Cases 1

U. S. vs. Murdock, 284 U. S. 141, 76 L. Ed. 210, 52 S. Ct. 63 ..... 1, 5

Ballman vs. Fagan, 200 U. S. 186. 2

U. S. vs. Saline Bank, 1 Peters 100. 2

In re Cantor, et al. 117 F. 356. 2

Marcello vs. U. S., 196 F. 2d. 437. 2

Knapp vs. Schweitzer, 357 U. S. 371, 78 S. Ct. 1302. 3

Byars vs. U. S., 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520 4

U. S. vs. Di Carlo, 102 F. Sup. 597 (ND Ohio, 1952). 5

McNabb vs. U. S. 318 U. S. 332. 5

U. S. vs. Saline Bank, 1 Pet. 100. 5

U. S. vs. McRae, LR 3 Ch. App. 7. 5

III

Law Journals

Page

Yale Law Journal (Dec. 1958) Vol. 68, p. 322-334 "Use of State Compelled, self-incriminating testimony in Federal Court." 4

Harvard Law Review, Vol. 70 (1956-7) p. 1463 5

Cornell Law Quarterly, Vol. 30 (1944-45) p. 255 et seq. ... 5

Grant, J. A. C. "Federalism and self incrimination" — Part 1 and 2 6

UCLA Law Review No. 4 (June, 1957, p. 549) and UCLA Law Review Vol. 5 — No. 1, p. 1 et seq. 6

9 Temple Law Quarterly, p. 57 "Immunity from compulsory self incrimination in a Federal system of Government." J. A. C. Grant 6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1958

No. 74

HENRY J. MILLS
OSMOND J. LITOLFF,

Petitioners,

versus

STATE OF LOUISIANA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF LOUISIANA

SUPPLEMENTAL BRIEF FOR PETITIONER

ARGUMENT

In our original brief (pages 13 and 14) we respectfully pointed out to your Honors that to grant petitioners relief from the sentences imposed upon them for contempt of court did not necessarily involve a departure from your Honors previous doctrine of the two sovereignties rule (Feldman vs. U. S.; Barron vs. Baltimore, Brown vs. Walker, Jack vs. Kansas, U. S. vs. Murdock—cited on page 10 of our original brief).

While cases cited for the proposition that one jurisdiction need not protect against the threat of prosecution in another jurisdiction when it compels a witness to testify

in a proceeding, it is significant that the facts in each one of the above mentioned cases clearly indicate that there was, in fact, no substantial threat of prosecution in any other jurisdiction.

Where such a threat did exist, "one way or another", the witness was protected from incriminating himself in the second jurisdiction:

Ballman vs. Fagan, 200 U. S. 186
U. S. vs. Saline Bank, 1 Peters 100
In re Cantor, et al, 117 F. 356
Marcello vs. U. S. 196 F. 2d 437.

The factual situation as shown by the record herein (see printed record page 38 et seq. as to petitioner Mills—original record page 38 et seq. and printed record page 46 et seq., original record page 47 et seq. as to petitioner Litolff) shows cooperation and collaboration between the District Attorney for the Parish of Orleans, who examined petitioners before the State Grand Jury, and the United States Attorney for the Eastern District of Louisiana and the Internal Revenue Service of the United States of America and its investigators (printed record page 45 as to petitioner Mills and printed record page 53 as to petitioner Litolff) in reference to members of the New Orleans Police Department regarding public bribery and income tax evasion and shows that Honorable Leon D. Hubert, Jr., District Attorney of the Parish of Orleans, had held conferences with the United States Attorney for the Eastern District of Louisiana regarding public bribery on the part of certain members of the New Orleans Police

Department and income tax evasion, felonies under the laws of the United States of America and the State of Louisiana.

The factual situation in this case is entirely different from that which existed in Knapp vs. Schweitzer, 357 U. S. 371 78 S. Ct. Reporter 1302, wherein your Honors stated that the record failed to disclose any collaboration between state and federal officers and failed to show that the State was being used as an instrument of federal prosecution or investigation.

We respectfully submit that in this case there is abundant evidence in the record that the federal government, through the United States Attorney for the Eastern District of Louisiana and the Internal Revenue Service of the United States of America and the agents thereof, were working in active collaboration and cooperation with Honorable Leon D. Hubert, Jr., District Attorney for the Parish of Orleans, who was in charge of the investigation before the Grand Jury for the Parish of Orleans, State of Louisiana.

That the United States Attorney for the Eastern District of Louisiana and the agents of the United States Internal Revenue Service were doing exactly what his Honor Mr. Justice Frankfurter, in Knapp vs. Schweitzer supra, said agents of the federal government should not do, that is, "taking advantage of the recognition of the States' autonomy in order to evade the Bill of Rights" and "if a federal officer should be a party to the compulsion of testimony by state agencies, the protection of the Fifth Amendment would come into play. Such testimony is barred in a fed-

eral prosecution," citing Byars vs. U. S. 273 U. S. 28, 47 S. Ct. 248, 71 Law Ed 520.

Not only under such circumstances is Byars vs. U. S., supra, authority for the exclusion of such testimony, but a host of other cases can be cited in support of this doctrine.

In an article published in the Yale Law Journal (Dec. 1958) volume 68, page 322, et seq. entitled "Use of State Compelled, Self Incriminating Testimony in Federal Court", Knapp vs. Schweitzer, supra, is discussed.

On page 327 of this Law Journal we find the following:

> "Since few States construe their constitutions to permit a witness to remain silent in the face of federal prosecution, Feldman may frequently enable the government to evade the privilege against self-incrimination. Seeking to exploit that decision, federal authorities might prosecute a witness previously called before state proceedings in which answers were compelled sufficient to establish his guilt in a subsequent federal trial. The government might even have inspired the State interrogation, for cooperation is quite common and collusion not unknown between federal and state officials. Furthermore, the latter could on their own initiative institute inquiries designed to further federal prosecutions."

(See cases cited under note 30, page 327 and notes 31, 32, 33 and 34 on page 328)

As a matter of fact, in this case, the District Attorney for the Parish of Orleans was to all intents and purposes, although a state official, performing a federal function and such state official is then regarded as a federal officer subject to federal limitations and standard of conduct.

In the Harvard Law Review, Volume 70—1956-1957, page 1463, it is stated that while a witness can be prosecuted in the federal courts for a crime he has admitted under compulsion of a state immunity statute (U. S. vs. Murdock 284 U. S. 141—1931)—but see U. S. vs. DiCarlo 102 Fed. Supp. 597 (N. D. Ohio—1952) in note 65 commenting on Feldman v. U. S. 322 U. S. 487, it is stated "however, prosecution would probably be barred if there were evidence of collusion between federal and state officials in procuring the testimony. Id at 492-4 dictum." In Feldman v. U. S. supra, p. 494, it is stated "If a federal agency were to use a state court as an instrument for compelling disclosures for federal purposes, the doctrine of the Byars case, supra, as well as that of McNabb vs. U. S. 318 U. S. 332 afford adequate resources against such an evasive disregard of the privilege against self-incrimination".

(See U. S. vs. Saline Bank, 1 Pet. 100; U. S. vs. McRae L. R. 3 Ch. App. 7.

See Cornell Law Quarterly, Vol. 30 (1944-45) page 255 et seq.

In the dissenting opinion of his Honor Mr. Justice Black, with whom his Honor, Mr. Justice Douglas, joined, in Knapp v. Schweitzer, supra, Mr. Justice Black stated that the untenability of the premises upon which the court

relied in Feldman, supra, has been clearly revealed in a series of penetrating law review articles by Professor J. A. C. Grant. (Immunity from compulsory self-incrimination in a federal system of government, 9 Temple Law Quarterly 57, (1934); Federalism and Self-Incrimination, 4 UCLA Law Review 549 Id. 1)

The second part of Professor Grant's article "Federalism and Self-Incrimination" will be found in volume 5 No. 1 of the U.C.L.A. Law Review—January 1958.

In this second part of the subject matter, Professor Grant presents a review of the study of the English Common Law on the doctrine of the dual sovereignties.

The summary and conclusions of Professor Grant will be found on pages 21-25 of Volume 5 No. 1 of the UCLA Law Review, and Professor Grant contends that the "Dual Sovereignty" theory can claim nothing from the Founding Fathers, virtually nothing from the English Common Law, and surprisingly little from American precedent prior to the Twentieth Century.

While we believe that your Honors can dispose of petitioners application and grant petitioners the relief sought because of the existence of the collaboration and cooperation between the District Attorney for the Parish of Orleans and the United States Attorney for the Eastern District of Louisiana and the agents of the United States Department of Internal Revenue, we respectfully submit for your Honors consideration the reasons advanced by Professor Grant in his splendid article why the "Dual Sovereignty Rule" should be abrogated and departed from.

CONCLUSION

For the reasons advanced in our original brief, as supplemented in this supplemental brief, it is respectfully submitted that the judgment of the Supreme Court of Louisiana should be reversed and the cause remanded in order that petitioners be discharged without date.

Respectfully submitted

EUGENE STANLEY
819 Whitney Building
New Orleans, Louisiana

ALBERT B. KOORIE
Carondelet Building
New Orleans, Louisiana

Counsel for Petitioners

CERTIFICATE

I certify that copies of the foregoing brief have been served upon oppsing counsel of record by placing the same properly addressed in the United States mail with adequate postage affixed thereto.